Supreme Court U.S.
FILED
JAN 16 1981

No. 80-858
No. 80-859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, SOL FISHKO, LEO L. VOHSEN, *et al.*,

Petitioners,

v.

GERALD ROBERT COLLIER,

Respondent.

and

INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 6, *et al.*,

Petitioners,

v.

GERALD ROBERT COLLIER,

Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OREN R. LEWIS, JR.
Counsel of Record

STEPHEN A. HORVATH
LEWIS, WILSON, LEWIS
& JONES, Ltd.
2054 North Fourteenth Street
Arlington, Virginia 22201
(703) 527-8800

Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES i
I. INTRODUCTION AND STATEMENT OF THE CASE 1
II. STATEMENT OF FACTS 2
A. Collier Presented Evidence of a Continuing Pattern of Violence by Petitioners, Designed to Obtain a Union Victory 3
B. Collier was Attacked and Injured in the Course of the Union's Pattern of Violence 6
C. The Union's Involvement 8
III. ARGUMENT 11
A. The Petitions Must be Denied Since Petitioners Failed to Properly Raise Federal Questions to the Supreme Court of Virginia 11
B. Federal Law Does not Pre-empt the State's Power to Adjudicate Claims for Tort Damages Resulting from Violence in Labor Disputes 12
1. Federal Labor Laws do not Limit the Introduction of Evidence of Union Activities During a Violent Strike 15
2. Evidence of Union Activity as Part of a Conspiracy to Conduct a Violent Strike is Admissible 16
C. The International Union is Vicariously Liable for the Acts of Members of the Local Union 18
CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

Automobile Workers v. Russell, 356 U.S. 634 (1958) 14
Brunswick Corp. v. Vineberg, 370 F.2d 605 (5th Cir. 1967) 17

Cases, continued: Page

Carbon Fuel Company v. United Mine Workers of America, 444 U.S. 212 (1979) 18

Congress of Industrial Organizations v. McAdory, 325 U.S. 472 (1945) 11

Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 17

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) 16

Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977) 14

Haiwasse River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341 (1920) 11

Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872 (7th Cir. 1971) 17

Industrial Bldg. Materials v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970) 17

International Brotherhood of Boiler Makers v. Newman, 116 Ga. App. 590, 158 S.E.2d 298 (1967) 18

International Brotherhood of Teamsters v. United States, 275 F.2d 610 (4th Cir. 1960) 18, 19

International Union of Operating Engineers v. Lassitter, 295 So.2d 634 (Fla. App. 1974), *rev'd on other grounds*, 314 So.2d 761 (Fla 1975) 18, 19

Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964) *cert. denied*, 377 U.S. 993 (1964) 17

Letter Carriers v. Austin, 418 U.S. 264 (1974). 20, 21

McDaniel v. Textile Workers of America, 36 Tenn. App. 236, 254 S.W.2d 1 (1952) 18

McCullough v. Kammerer Corporation, 323 U.S. 327 (1945) 11

Michigan Sugar Company v. Dix, 185 U.S. 112 (1902) 11

Cases, continued: Page

Milk Wagon Drivers Union of Chicago, Local No. 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) 15

Oltman v. Miller, 407 F.2d 376 (7th Cir. 1969) 17

San Diego Building Trades Council Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) 13

Schoenkopf v. Brown & Williamson Tobacco Corp., 483 F.Supp. 1185 (E.D. Pa. 1980) 17

Shulman v. Burlington Industries, Inc., 255 F.Supp. 847 (S.D.N.Y. 1966) 17

Standard-Vacuum Oil Co. v. United States, 338 U.S. 157 (1950) 11

Truax v. Corrigan, 257 U.S. 312 (1971) 16

United Brotherhood of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1967) 18

United Const. Workers v. Laburnum Const Corp., 194 Va. 872, 75 S.E.2d 694 (1953) *aff'd*, 347 U.S. 656 (1954) 18

United Const. Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954) 13, 14, 15

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 13

Youngdahl v. Rainfair, 355 U.S. 131 (1957) 15

Winona R. St. P. Land Co. v. State of Minnesota, 159 U.S. 540 (1895) 11

Winkler Koch Engineering Co. v. Universal Oil Products Co., 79 F.Supp. 1013 (S.D.N.Y. 1968) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-858
No. 80-859

INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, SOL FISHKO, LEO L. VOHSEN, *et al.*,

Petitioners,

v.

GERALD ROBERT COLLIER,

Respondent.

and

INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 6, *et al.*,

Petitioners,

v.

GERALD ROBERT COLLIER,

Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

I. INTRODUCTION AND STATEMENT OF THE CASE

Petitioners are seeking a review of a reward of damages against them for the brutal beating of respondent, Gerald R. Collier. In the course of a turbulent labor dispute at the Washington Post, Mr. Collier was severaly injured as the result of a concerted pattern of violence by

the petitioner Unions. Mr. Collier brought a tort action in the Circuit Court for the County of Arlington, Virginia, seeking recovery on the basis of conspiracy and respondeat superior. After a two-week trial, the jury returned a verdict of $200,000 in favor of Mr. Collier. Petitioners sought the right to appeal to the Supreme Court of Virginia. Their Petitions for Appeal were denied. Likewise, petitioner for rehearing to the Supreme Court of Virginia were denied.

Petitioners have failed to present any valid basis for the granting of a writ of certiorari to the Supreme Court of Virginia. First, petitioners failed to properly raise the federal questions presented to this Court in their Petitions for Appeal to the Supreme Court of Virginia. The Supreme Court of Virginia found no reversable error, and denied their petitions. Second, the petitions present no federal questions which have not already been decided by this Court. In deciding those questions, this Court has established rules of law which are consistent with the rulings below, and would require the affirmance of the award of damages to Mr. Collier.

II. STATEMENT OF FACTS

On March 12, 1976, during the course of a strike by petitioners at the Washington Post, Gerald R. Collier, a pressman trainee, was brutally assaulted by five men, who wrapped him in barbed wire, slashed him with a knife, dragged him face down across a country road, and hit him on the knee and head with a pipe, leaving Collier permanently and severely disabled with traumatic epilepsy and other neurological and psychological injuries. The assault occurred during an especially violent strike conducted by members of the International Printing and Graphic Communications Union (hereinafter "Interna-

tional"), and the International Printing and Graphic Communications Union, Local No. 6 (hereinafter "Local 6").

A. Collier Presented Evidence of a Continuing Pattern of Violence by Petitioners, Designed to Obtain a Union Victory.

The strike against the Washington Post was marked by a pattern of violence, obviously designed to intimidate employees from working at the Post. The strike began in the early morning of October 1, 1975, when the union members sabotaged all nine presses, set two presses on fire and beat up the night foreman, James Hover (Tr. 89, 1506-09). Later that day, a member of the union threw a block of wood in the face of a Post reporter, Kathy Sawyer (Tr. 151-55). As part of this pattern of violence, the respondent, Gerald R. Collier, was attacked and beaten.

The strike against the Washington Post had potential far-reaching effects on the International and Local 6. One of the major issues of the strike was the Post's proposal to reduce manning in the pressroom by some 40 to 46% (Tr. 1243). This strike was key for the International since it involved a large, prestigious, eastern newspaper. If the union were forced to cut almost in half the work force in the pressroom, it could have serious effects on the union's membership. The union was interested in maintaining as many of its members as possible in the pressroom. Although the ultimate goal of the International union may have been proper, the means by which the union sought to achieve that goal were unlawful.

After the initial outburst of violence, a continuous pattern of violence developed. Several weeks after the strike began, a Post reporter who crossed the picket line, Jules Witcover, was struck in the face by a striking

pressman (Tr. 142-44). As a result of union setbacks, the strike violence escalated in December of 1975. After several months of bitter negotiations, the Post, in early December, 1975, declared an impasse and began to hire permanent replacements for the striking pressmen. On the evening of December 13, after a large rally to protest this action, a Post employee was attacked by several men wearing ski masks, who stated that they were going to "teach this Chinaman where he belongs" (the victim had been called "Chinaman" by strikers when he crossed through the picket line) (Tr. 313-21).

A number of pressmen quit the union and returned to work in late December (Tr. 304). The union put out "wanted" posters, which accused these men of being scabs, and then defined scabs in the most despicable way, stating that "no man has a right to scab as long as there is a pool of water deep enough to drown his body in, or a rope long enough to hang his carcass with". (PX 18, 24). This language was suggested to the Local 6 by the president of the International. The posters were hung in the neighborhoods where the returnees lived (Tr. 1210-11). Herbert Kinard, one of the members who returned to work, noticed a group of strikers distributing posters concerning him near his home in Woodbridge, Virginia, in early January, 1976. Several days later, while he was inside the Arlington County Courthouse, he was harassed and threatened by 13 strikers, including one Eugene O'Sullivan. The harassment reached such an extent that it was necessary to obtain a police escort in order that he and his wife could leave the courthouse (Tr. 646-58). Another former union member who returned to work, Roy Ferrell, was followed home one night to Falls Church, Virginia, by two carloads of union members (including O'Sullivan), who tried to run him off the road.

Later, Ferrell was assaulted in the face by a member of the pressmen's union after he had left work (Tr. 325).

Pursuant to its statement that replacements would be hired, the Post hired a number of permanent employees to replace the striking union members. On January 5, 1976, Post and union negotiators met to discuss the employment rights of the new non-union workers. The following night, a riot broke out in front of the Post building. Among the 100-150 rioting pressmen were the top Local 6 officers (Tr. 287-88, 336). Windows were broken, employees were threatened and at least two Post employees, Jane Brooks and another lady, had their cars "rocked" as they tried to drive home by a group of abusive strikers (Tr. 288-89). The following day, a striker slugged one Post executive in the back of the head, and another striker spit upon one Post executive and challenged him to a fight (Tr. 340-45). Two weeks later, a telephone operator was smashed in the face and called a "cocksucking rat bitch" by a man she later identified as one of the picketers (the second time she saw him, he said, "Well, I guess that telephone operator didn't learn her lesson." (Tr. 169).

These are examples of the pattern of harassment and violence employed by the union for the obvious purpose of intimidating Post employees from working at the struck newspaper. One of the victims of this pattern was the respondent, Gerald Collier. People were constantly threatened, windows broken, and tires slashed. The Post found it necessary to transport many of its employees by shuttle bus and some key employees by helicopters. Several persons were provided with bodyguards (Tr. 281, 283-75, 297).

B. Collier was Attacked and Injured in the Course of the Union's Pattern of Violence.

The pattern of violence continued long after the involvement of the International. Gerald R. Collier was severely injured as part of the pattern of violence, in a concerted effort to cripple or kill him, because he made the mistake of going to work for the Post during the labor dispute.

Collier was originally hired in November of 1975 as a guard for James Hover (a night foreman at the Washington Post who was assaulted on the first day of the strike) and his family at the Hover farm near Beaverdam, Virginia (Tr. 562-63). In the middle of December, two union members, Fred Tweedlie and a bearded individual, Eugene O'Sullivan, arrived at the farm in a car decorated with strike banners and belligerently demanded to see Hover. Collier told them Hover was not there, and after putting his hand on his gun, told them to leave (Tr. 564-47).

On March 8, 1976, Collier began to work at the Washington Post as a pressman trainee. On March 12, Collier left work around 8:15 p.m. Crossing the picket line, he declined to accept a leaflet offered to him by one of the union members who then told him, "that's all right, you son of a bitch, we'll get you, too." (Tr. 607). Collier got into his car, and proceeded to drive to his home near Massaponax, Virginia, some 60 miles south of Washington. As he crossed the 14th Street Bridge, he was tailgated and nudged by an automobile, containing three figures. Collier continued driving on I-95 until he was near Stafford, Virginia, where a car with three figures in it again pulled up behind him and tried to run him off the road. Frightened, Collier sped up to 100 mph., hoping that he would be stopped by a policeman (Tr. 607-09).

At the Thornburg exit, Collier left the Interstate and drove about 2½ miles down a country road. Suddenly, a small, red, pick-up truck pulled in front of him and stopped, and a car with three passengers came up behind his car and sandwiched him in. Two men, wearing ski masks, emerged from the truck and caught Collier and began wrapping his neck and arms in barbed wire. Three men, also wearing ski masks, came over from the car. One of them said, "That's the son of a bitch who ran a couple of our members off the Hover farm." (Tr. 611). One of the three, who had a beard, then came up to Collier and said, "Yes, that's the son of a bitch." (Tr. 613). [Eugene O'Sullivan, as noted above, had a beard; he had also signed the daily strike list for March 12, 1976 (PX 42)].

The five men then began to hit Collier with their fists and with a pipe to his knee, which caused him to buckle to the ground. They took out a long, bladed knife, similar to the knives used in the pressroom, and cut him along his arms and chest (Tr. 614-15). Then, they flipped him over and, while one forced Collier's head and chest down, dragged him across the tar and gravel road. This torture continued until one of the men said, "Al, Al, for Christ sakes, don't hit him anymore. We're going to be late to Jimmy's farm." (Tr. 616). [Collier had earlier testified that Hover was called "Jimmy" by the pressmen, while his friends and family called him "Jack". (Tr. 604)]. The assailants hit Collier with a pipe and threw him in a ditch.

Collier was subsequently hospitalized. He has not worked since the assault. Substantial medical testimony was introduced to prove that Collier has severe and permanent neurological and psychological injuries as a result of the assault. One of the manifestations of his traumatic epilepsy which developed from the beating is a seizure in which Collier seems to relive the assault,

grasping as if to pull the wire from around his neck (Tr. 516-17).

C. The Union's Involvement.

Both the International and the Local 6 were well aware of the violence attending the strike, but did nothing to stop it. For example, James Dugan, president of Local 6, testified that he knew of the sabotage in the pressroom, and the assaults of Hover and the Post reporters, but that he did nothing to discipline the perpetrators (Tr. 1218). In fact, the officers of Local 6 were held in contempt of court for their involvement in the January 6, 1976 rally. Collings, the secretary/treasurer of Local 6, learned of the Collier incident, but did nothing to investigate it or to discipline those involved (Tr. 1460).

Sol Fishko, the president of the International, was aware of the violence from the very beginning of the strike. The International was actively involved in the strike. According to Sol Fishko, there was a concerted effort on the part of newspaper publishers to provoke strikers and to reduce manning in pressrooms across the country (Tr. 883-84). Fishko attempted to contact the publisher of the Post after the strike broke out (PX 33). International officers and representatives attended negotiating sessions (Tr. 91-92; 1183), and spoke at rallies (PX 9c). The International sanctioned the strike, paid certain expenses and paid strike benefits (PX 12, 38, 39). Indeed, strike benefits, under the International's Constitution, originally would only be provided for 26 weeks (PX 7). However, just after the Post announced that it would hire permanent replacements, the Board of Directors of the International passed a resolution for a referendum to increase strike benefits and to extend them as long as the strike was actively prosecuted (PX 9c). The referendum was scheduled for March 1, 1976, which not by happen-

stance, was the same day that the strike benefits would have otherwise terminated for the Post strikers. The referendum passed.

All the while, the International knew of the violence occuring during the strike. Fishko and the International secretary/treasurer, Burton Riley, knew about the damage to the presses and many of the assaults (Tr. 948, 952; 1183). Again, even though there was a recognition of the International's obligation to take some sort of action to halt the violence, there was no investigation or disciplinary action taken against either Local 6 or its members (Tr. 949-50). Fishko merely made self-righteous statements and editorials. By not investigating, discouraging or doing anything to deter the violence, the International union acquiesed to the course of violence. In fact, the International's only real action was to give support to the Local 6 and the violence by its members. The entire course of conduct by the International showed a ratification and authorization of the pattern of violence.

The International did not merely play a passive role, but contributed to the situation. For example, after it was known that a number of union members were going back to work at the Post, Fishko received a letter from a leader of another union, enclosing the definition of a scab, containing the language that "no man has a right to scab as long as there is a pool of water deep enough to drown his body in, or a rope long enough to hang his carcass with". Fishko passed a copy of the letter on to Local 6 on December 19, 1975 (PX 23). The pressmen printed the "Wanted" posters, which included the definition of a scab (Tr. 1447-48). On December 24, an assistant of Fishko's picked up from strike headquarters, several copies of the "Wanted" posters which incorporated the vitriolic language which Fishko had conveyed to

Dugan (PX 24). The International had, in effect, poured fuel on the fire of violence, as is evidenced by the harassment of Kinard (see discussion, supra p. 4).

On July 14, 1976, fifteen members of the union were indicted for their violent conduct on the first day of the strike. The International's officers became actively involved in their defense—endorsing a legal defense committee (PX 27), communicating with some of the indicted men (PX 31), writing letters to the Judge of the case (PX 13, 14), and generally keeping in close contact with the case (PX 32). Notwithstanding a policy that members convicted of violent crimes should not receive strike benefits (Tr. 1183), the International continued to pay benefits to eight striking members (the others had transferred to jobs elsewhere), even after they had pled guilty to violent misconduct during the course of the strike and been sentenced (PX 27, 40, 41, 51). Furthermore, even though President Fishko stated that a member convicted of violent conduct should be expelled (Tr. 1054), none of the fifteen who pled guilty were expelled or disciplined (Tr. 1237-38). Indeed, the International gave special benefits to the members who were guilty of strike violence. One of them, Eugene O'Sullivan, who was involved in the assaults on Kinard, Ferrell and apparently Collier, and who pled guilty with regard to an assault on Hover (PX 55), received special, and unprecedented, assistance from Fishko, who obtained a job for O'Sullivan at a newspaper in Newark (Tr. 1252, PX 30).

III. ARGUMENT

A. The Petition Must be Denied Since Petitioners Failed to Properly Raise Federal Questions to the Supreme Court of Virginia.

Petitioners have attempted to raise questions of violation of the United States Constitution, federal labor laws and violation of the holdings in other decisions by this Court as a basis for granting a writ of certiorari. These issues were not properly raised in the Petitions for Appeal to the Supreme Court of Virginia and cannot now be raised in their Petitions for Certiorari.

> "The rule is firmly established and has been frequently reiterated, that the jurisdiction of this Court to reexamine the final judgment of a state court . . . cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right.

Michigan Sugar Company v. Dix, 185 U.S. 112 (1902). *See Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950); *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1945); *McCullough v. Kammerer Corporation*, 323 U.S. 327 (1945). Even if a federal issue is raised at the trial, this Court cannot examine the federal issue unless it was also presented to the state appellate court. *Haiwassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341 (1920); *Winona & St. P. Land Co. v. State of Minnesota,* 159 U.S. 540 (1895).

The federal questions raised in the petitions were not properly or adequately raised to the Supreme Court of Virginia. The International's petition to the Supreme Court of Virginia does not even cite the federal statutes it

relies upon in its Petition for Writ of Certiorari; nor does it cite the federal constitution. The International's petition to the Supreme Court of Virginia only gives a short reference to the federal labor laws—which were not the same issues raised in their present petition. The Petition by Local 6 to the Supreme Court of Virginia makes no citation of the federal statutes or constitution.

Petitioners only made casual references to any federal decisions in their petitions to the Supreme Court of Virginia. These references were made in connection with state law arguments on the sufficiency of the evidence. Petitioners are now attempting to expand on these references, and claim that the federal questions were presented to the Supreme Court of Virginia. The majority of the federal issues presented in the "Federal Questions Raised" portions of the Petitions for Certiorari may have been raised at the trial court, but were not raised on appeal to the Supreme Court of Virginia. Other state court issues such as the propriety of the jury instructions have been raised for the first time in these petitions. Issues cannot be presented to this Court that were not raised to the Supreme Court of Virginia. For this reason alone the Petitions for Certiorari must be denied.

B. Federal Law Does Not Pre-empt the State's Power to Adjudicate Claims for Tort Damages Resulting from Violence in Labor Disputes.

Petitioners' argument appears to be that the state has improperly regulated their conduct by imposing state tort liability for injuries sustained by Mr. Collier during the strike. Petitioners further argue that evidence of appropriate union activity was improperly admitted to prove the liability because the activity is protected under Federal Labor Law. Their arguments are without merit.

This Court has consistently held that a state is free to impose tort liability for union violence. A state has a compelling interest in the maintenance of domestic peace. In the absence of a clear congressional direction, states retain jurisdiction in providing remedies for wrongs due to violent activity during labor disputes. *San Diego Building Trades Council Millmen's Union Local 2020 v. Garmon*, 359 U.S. 230, 247 (1959); *United Construction Workers v. Laburnum Const. Corp.*, 347 U.S. 656 (1954).

> This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation. Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154; United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025; United Automobile Aircraft and Agricultural Implement Workers v. Wisconsin Employment Relations Board, 351 U.S. 266, 76 S.Ct. 794, 100 L.Ed. 1162; Youngdahl v. Rainfair, Inc., 355 U.S. 131, 78 S.Ct. 206, 2 L.Ed.2d 151; International Union, United Automobile, Aircraft and Agr. Implement Workers v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030.

United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966).

Congress has neither provided nor suggested any substitution for traditional state court procedures for collecting damages for injuries caused by tortious conduct of labor unions. This Court has stated, "for us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from

liability for their tortious conduct." *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 664 (1954). "If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions substantial immunity from the consequences of mass picketing or coercion such as employed during the strike in the present case." *Automobile Workers v. Russell*, 356 U.S. 634, 645 (1958).

Russell involved a situation which was substantially similar to the case at bar. In *Russell*, an employee brought an action to recover for lost pay when, due to force of numbers, threats of bodily harm and damage to property, the employee was unable to get to work. The Court held that the Federal Labor Law did not preclude a common-law action for tort damages. Likewise, the case at bar involves an action for damages resulting from union violence.

The imposition of state tort damages for labor violence will not "regulate" labor union activity. ". . . there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA." *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 299 (1977). Since petitioners argue that the imposition of liability for Mr. Collier's injuries amounted to a regulation of their conduct, and since this Court has ruled that civil tort damage for violence does not infringe on protected rights, the petitioners claims are without any basis in law.

1. The Federal Labor Laws do not Limit the Introduction of Evidence of Union Activities During a Violent Strike.

Since Federal Labor Law does not pre-empt a state from imposing liability for violence, nothing in the acts preclude or limit the state's imposition of damages resulting from violence, or from permitting proof of union activities to sustain a damage award. Various union activities may be used to show the union's involvement in the violence. This Court has recognized that "peaceful" union acts may be part of a pattern of violence, and subject to state control. "Acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence." *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies,* 312 U.S. 287, 292 (1941). *See, Youngsdahl v. Rainfair,* 355 U.S. 131 (1957).

Merely because labor unions are involved in strike violence does not limit a state court from admitting evidence of the international and local unions' involvement in that violence, or limit evidence of motive for conducting the violence. Labor unions are treated like any other organization when it comes to liability for violence. *United Const. Workers v. Laburnum Const. Corp.,* 347 U.S. 656, 669 (1954). The unions lose any protection that they may have been afforded by the Federal Labor Laws when they engage in violence. Senate Report No. 105, 80th Cong., 1st Sess. 50 (engaging in violence "at least deprive[s] the violators of any protection furnished by the Wagner Act"). When the petitioners engaged in violent actions, they stepped outside the bounds of the Federal Labor Laws, and lost any protection they may have enjoyed. Petitioners have lost no right to free speech, when such speech was used to prove their

involvement in the violence. The state court properly permitted Collier to prove the violence and the petitioners' involvement in the violence.

Petitioners contend that Collier improperly attempted to prove the underlying controversy. Rather than attempt to prove the merits of the strike, Collier avoided any assertions as to the merits of the underlying controversy. Evidence was properly admitted to show agency, ratification, authorization and conspiracy. Inevitably, these items were proved, in part, by showing some union activity. Petitioners appear to suggest that there should be no reference to any union activity. Such a rule would be untenable, and, since union violence by definition involves union activity, petitioners' rule would effectively preclude any proof of union involvement in violence, and would immunize unions from liability.

2. *Evidence of Union Activity Conducted as Part of a Conspiracy to Conduct a Violent Strike is Admissible.*

The state court properly allowed Gerald Collier to introduce evidence of various union activities to show motive, conspiracy and agency. Because of the nature of a conspiracy, proof of the conspiracy may necessarily encompass proof of a lawful goal, or proof of certain lawful activity conducted as part of the conspiracy. Furthermore, what is properly admissible evidence in the trial of a conspiracy would appear to be a state law question, not a question for the Supreme Court under Federal law.

A conspiracy is the combination of two or more individuals to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means. *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921); *Truax v. Corrigan,* 257 U.S. 312 (1921). In the present case, the

petitioner unions attempted to accomplish a lawful and permissible labor strike in order to prevail in a labor dispute, but they used unlawful means of persuading or intimidating non-striking workers—specifically, they committed a violent attack upon Mr. Collier.

Unlawful conspiracies commonly consist in part of conduct entirely lawful in itself. *Shulman v. Burlington Industries, Inc.*, 255 F.Supp. 847 (S.D.N.Y. 1966). Moreover, circumstantial evidence may provide adequate proof of conspiracy, *Industrial Bldg. Materials v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970); *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872 (7th Cir. 1971); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 483 F.Supp. 1185 (E.D. Pa. 1980), and agreement among co-conspirators may be inferred from acts of the parties. *Oltman v. Miller*, 407 F.2d 376 (7th Cir. 1969). Lawful or protected activities of unions should be admissible as evidence of conspiracy to commit an unlawful or unprotected act. Acts committed in effectuation of a conspiracy need not be illegal in themselves and acts which may be wholly innocent may yet be part of and tend to accomplish an illegal conspiracy. *See Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993; *Brunswick Corp. v. Vineberg*, 370 F.2d 605 (5th Cir. 1967); *Winkler-Kock Engineering Co. v. Universal Oil Products Co.*, 79 F.Supp. 1013 (S.D.N.Y. 1948). It is for this reason that acts which are legal in themselves lose that character when they become constituent elements of an unlawful scheme. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Obviously, since the nature of a conspiracy encompasses both lawful and unlawful acts, respondent had a right to prove both lawful and unlawful acts when they were conducted as part of a conspiracy.

C. The International Union is Vicariously Liable for the Acts of Members of the Local Union.

The International argues in its petition that, on the basis of the facts in this case, it should not be held vicariously liable for the assault by its members on Gerald Collier. The test for determination of vicarious liability of labor unions is based upon the Common Law. "[T]he common law of agency shall govern in determining whether any person is acting as an 'agent' of another person". *Carbon Fuel Company v. United Mine Workers of America,* 100 S.Ct. 410, 414 (1979).

There can be no question but that an international union may be held liable for labor violence under an agency or respondeat superior theory. In *United Const. Workers v. Laburnum Const. Corp.,* 194 Va. 872, 75 S.E.2d 694 (1953) *aff'd,* 347 U.S. 656 (1954), the court held that the very nature of the organization of the international union in the case was sufficient to show that the local union was an agent of the international union. *See International Union of Operating Engineers v. Lassitter,* 295 So.2d 634 (Fla. App. 1974) *rev'd on other grounds* 314 So.2d 761 (Fla. 1975) (international liable under agency theory for acts of agent of local); *United Brotherhood of Carpenters v. Humphreys,* 203 Va. 781, 127 S.E.2d 98 (1962); *International Brotherhood of Teamsters v. United States,* 275 F.2d 610 (4th Cir. 1960); *McDaniel v. Textile Workers Union of America,* 254 S.W.2d 1, 36 Tenn. App. 236 (1952); *International Brotherhood of Boiler Makers v. Newman,* 116 Ga. App. 590, 158 S.E.2d 298 (1967).

Ample evidence was presented in this case to show the agency relationship between the assaulting members of the union and the local and international unions. The International's constitution in this case, by itself, estab-

lishes the agency relationship between petitioners and the violent union members. *See International Brotherhood of Teamsters v. United States,* 275 F.2d 610 (4th Cir. 1960); *International Union of Operating Engineers v. Lassitter,* 295 So.2d 634 (Fla. App. 1974), *rev'd on other grounds,* 314 So.2d 761 (1975). The International's constitution evidences a wide degree of control over the members, including controls over membership; suspending members for violations of the laws, limiting travel of members; control over conduct in the press-room; and requiring certain actions by its members to obtain strike benefits (PX 7). In addition to the constitution, other evidence was introduced to show the agency relationship. The union recognized its obligation to expel members for picket line violence, and to proceed against a local who declared for violence. The International had powerful sanctions which it could impose on its violent members by cutting off strike benefits or expelling the members. Rather than impose these sanctions, the International union gave specific strike benefits to the violent individuals, and gave extraordinary treatment to one of the individuals involved in much of the violence (see discussion, supra p. 10). The union's actions established both a ratification of the pattern of violence and an authorization of future violence by its acquiescence to the course of violence.

During the course of the violence, the International union suggested to the local union that the pattern of violence continue. As part of the definition of a "scab" sent by the president of the International to the Local 6, the following is found: "No man has the right to scab as long as there is a pool of water deep enough to drown his body in or a rope long enough to hang his carcass." This language was incorporated by the Local 6 in the course of a violent strike, into "Wanted" posters. In the context of

this case, little else could have been done by the International union to encourage the use of violence.

The petitioners argue that it was a violation of their First Amendment rights to use the strike posters as evidence of the petitioners' participation in the violence. There is no First Amendment protection for speech which indicates the union's approval of violence in the cause of a strike. In the context of the Post strike, the language could only be interpreted as suggesting further violence. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) considered and rejected an argument similar to petitioners':

> The issue here is whether or not the conduct and language of the strikers were likely to cause physical violence. Petitioners urge that all of this abusive language was protected and that they could not, therefore, be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence. See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769-769, 86 L.Ed. 1031. Petitioners contend that the words used, principally "scab" and variations thereon, are within a protected terminology. But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may case to be persuasion and become intimidation and incitement to violence.

355 U.S. at 138. Petitioners' reliance on *Letter Carriers v. Austin*, 418 U.S. 264 (1974) is misplaced. *Austin* does not hold that petitioners are immune from liability by using Jack London's definition of "scab". Rather, it considered the use of the definition in a defamation suit, and found that in the context of a labor dispute, the

words could not be a representation of untrue facts. *Austin* was a defamation action whereas the case at bar is an action arising out of a violent strike. Furthermore, the holding in *Austin* leaves open the issue of whether the language might be actionable in other circumstances. 418 U.S. 264, 286. In any event, no claim has been made for recovery based on the language alone. Collier merely used the language as evidence of the International and Local's approval of the violence.

Collier presented sufficient evidence to prove that the agents of petitioner unions attacked and beat him, in an effort to discourage employees from working at the Post. Part of this proof was the evidence of the "Wanted" posters, which were properly admitted. The imposition of liability, and the proof of the unions' involvement does not offend the Federal Labor Laws, the United States Constitution, nor the decisions of this Court.

CONCLUSION

For the above reasons, the Petitions should be denied.

Respectfully submitted,

OREN R. LEWIS, JR.
Counsel of Record

STEPHEN A. HORVATH
LEWIS, WILSON, LEWIS
& JONES, Ltd.
2054 North Fourteenth Street
Arlington, Virginia 22201
(703) 527-8800

Counsel for Respondent.